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Supreme Court, U.S.
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No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The court of appeals resolved this case solely on a question of law, and this petition presents exactly — and only — that question of law. Respondent Hernandez does not seriously dispute that the question of law exists, that it is important,[1] and that the circuits are in conflict. Hernandez only suggests that the instant case is not in the proper posture to resolve the legal question. But Hernandez is wrong, as shown below.

I. THE PETITION PRESENTS A PURE QUESTION OF LAW; NO FACTUAL DISPUTE IMPEDES THIS COURT'S REVIEW

Judge Reinhardt's opinion held as a matter of law that Hughes'

> policy that it will not rehire employees who left the company due to violations of personal conduct rules [although lawful as to the non-disabled] violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated.

(Pet. App. 13a.) Hernandez characterizes that clear holding as "dicta" (Opp. at 10 n.7), and suggests that "factual disputes" remain to be resolved (Opp. at 12-13). But Hernandez is demonstrably wrong.

First, Hernandez tells the Court that there remains a dispute as to whether "Hughes' alleged 'unwritten' policy of

1. Hernandez notes (Opp. at 7 & n.4) that the EEOC made a "reasonable cause" finding in his favor. That finding simply underscores that the legal question presented is important; the question is one as to which the EEOC, along with the Ninth Circuit, requires guidance. Hernandez contends that there is nothing in the district court record showing that other employers care about the legality of no-rehire rules. (Opp. at 8 n.6.) But the amicus brief in support of *certiorari* from the Equal Employment Advisory Council demonstrates that such rules are commonplace.

never rehiring employees terminated for violating company rules actually existed" (Opp. at 12.) There is no such dispute. As the Ninth Circuit stated, Hughes unquestionably has a "policy against rehiring employees who were terminated for any violation of its misconduct rules." (Pet. App. 11a.)

Second, Hernandez contends that a factual dispute exists over whether this policy was applied to him. (Opp. at 12.) Once again, not so. The Ninth Circuit cited uncontradicted evidence "that once [the decisionmaker] saw that [Hernandez] 'quit-in-lieu of discharge,' she concluded that he was ineligible for rehire. . . ." (Pet. App. 3a-4a.) The court concluded that "[*t*]*here is no question that Hughes applied this [no rehire] policy in rejecting Hernandez's application*." (Pet. App. 12a n.17; emphasis added.)[2]

Given Hernandez's claim about these supposed "factual disputes," one might reasonably ask how the Ninth Circuit could have been so badly mistaken about the record. The simple answer is that there was — and is — no factual dispute, *and Hernandez acknowledged as much in the court of appeals.* Hernandez forcefully and expressly argued to the court of appeals that he was ineligible for rehire because Hughes has a "practice of prohibiting individuals who have resigned in lieu of termination to be re-hired." Appellant's Reply Brief in the Court of Appeals at 7-8.[3] Thus, Hernandez admitted that the policy existed and was applied to him; indeed, *that was his principal theory of the case*. *Id.* (the policy is unlawful because it disqualifies "all individuals who's [sic] resignation in lieu of termination was due to a disability").

2. Hernandez alternatively contends that there is a factual dispute over the applicability of the policy to persons who resigned in lieu of involuntary discharge. (Opp. at 12.) Still again, not so. As the Ninth Circuit stated, there is "no difference in Hughes' treatment of employees who were terminated as opposed to those who resigned under threat of termination." (Pet. App. 4a n.4.)

3. A copy of Hernandez's Reply Brief has been lodged with the Clerk of this Court for the Court's convenience.

Hernandez's fidelity to the record thus waxes and wanes depending on the circumstances. But that sort of sleight of hand cannot prevent review here. As this Court recently reiterated, where "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895). This rule "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (citation omitted). The rule serves the "integrity of the judicial process" by preventing parties from "playing fast and loose with the courts" based on the "exigencies of the moment." *Id.* (citations and internal quotations omitted).

Because there are no factual questions remaining to be decided, this case is well-positioned for review. As the court of appeals stated, "[T]here is no question" that Hughes had a no-rehire policy, that it applied that policy uniformly to those who quit in lieu of termination, and that the policy was the basis on which Hernandez's application for reemployment was rejected. (Pet. App. 11a-12a & n.17.) Hernandez now says that a dispute remains as to whether the no-hire rule is "a legitimate workplace rule." (Opp. at 13.) This, of course, is not a factual question at all, but rather precisely the issue posed by this petition: whether the ADA requires that employers provide preferential rehire rights — second chances — when individuals with alleged disabilities engage in misconduct.[4] The Ninth Circuit answered that

4. Tellingly, Hernandez's brief quotes the letter from the Alcoholics Anonymous counselor attached to Hernandez's job application. The letter expressly asked Hughes to give Hernandez "a second chance." (Opp. at 5.) The law does not require this, as Hughes' petition demonstrated. Contrary to Hernandez's argument (Opp. at 9), there is no mystery, let alone a legal issue, behind Hughes'

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question in the affirmative, and in doing so created a rift in previously settled law that this Court should resolve.

The other alleged "factual disputes" are red herrings. Hernandez contends that Bockmiller, who rejected Hernandez's rehire application, perhaps could have deduced that Hernandez's prior discharge was related to substance abuse (Opp. at 9-10),[5] and that the person who wrote Hughes' EEOC position statement did not accurately set forth some facts about Hernandez's disqualification from rehire (Opp. at 6).[6] These are red herrings because they at most pertain to Hughes' second, alternative basis for summary judgment. The petition noted (Pet. at 16-17) that summary judgment also could have been sustained on the narrow ground that the decisionmaker, Bockmiller, did not even know of Hernandez's drug addiction, and hence could not possibly have engaged in discrimination based on the addiction. (Judge Reinhardt's response to that contention — that an employer violates the ADA by not publicizing to its hiring staff who the "disab[led]" persons might be (Pet. App. 12a) — is unprecedented and wrong.) Whether the Court wishes to consider that narrower ground, perhaps in a summary reversal, has nothing whatsoever to do with the broader issue presented by the petition: whether no-rehire rules may be uniformly applied. That broader issue is a pure question of law, and there are no factual disputes that pertain to it.

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rule (i) prohibiting rehire of *employees* who are discharged for misconduct like drug use, but (ii) banning for one year *applicants* who fail a pre-hire drug test. The former are persons who violated a clear company rule while working on missile systems sold to the U.S. government. The latter are persons who engaged in improper conduct, but who never were subject to Hughes' rule. Employees and applicants simply are not similarly situated.

5. The deduction, Hernandez tells us, could have been made because of the reference in his minister's letter to *alcoholism*. (Opp. at 5.) But nothing in the letter mentioned *cocaine use*.

6. The stray language in the letter at most suggested that, with satisfactory proof of drug rehabilitation, the Company might have considered making an exception to its no-rehire rule in Hernandez's case. That stray language is wrong — Hughes' policy permits no exceptions for anyone — but the language (far from suggesting a legal violation) suggested that the Company might have considered doing *more than* what the ADA requires.

CONCLUSION

The Court should grant the petition for *certiorari* and consider summary reversal of the court of appeals.

Respectfully submitted,

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